Petition

81-1796

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILLY THOMAS COWARD, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a prosecution for violations of federal narcotics statute, 18 U.S.C. §§ 801 et seq., is the admission, without foundation, of evidence concerning post-conspiracy narcotics transactions violative of Fed. R. Evid. 404(b) and the principles of Fed. R. Evid. 801(d)(2)(E)?

2. Does a trial court violate a federal criminal defendant's fifth amendment right to indictment by grand jury when, in reading an indictment originally charging a three party conspiracy to the jury, it omits the portion of the indictment charging one of the defendant's two alleged co-conspirators, and thus charges a new two-party conspiracy?

3. In a conspiracy case where an indictment had been changed from one charging a three-party conspiracy to one charging

a two-party conspiracy, should a defendant's conviction be reversed because of the trial judge's decision to provide the jury with an unredacted copy of the original indictment?

4. Should a defendant's conviction be reversed because of the trial judge's failure, contrary to Fed. R. Crim. P. 30, to allow the defendant to object out of the presence of the jury to the judge's decision to give the jury an unredacted copy of the original indictment?

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OPINIONS BELOW

The opinion below by the Court of Appeals for the Fourth Circuit has been designated for publication but has not been published at the time of the submission of this petition. A copy of this opinion is set out in full in the Appendix. Rehearing was subsequently denied by the Court of Appeals without opinion.

No opinions were written by the district court imposing judgments of conviction on the Petitioner at his original trial and on retrial. The reversal of the Petitioner's first conviction on appeal was published. United States v. Coward, 630 F.2d 229 (4th Cir. 1980). A copy of this opinion is set out in full in the Appendix.

JURISDICTION

The Petitioner seeks review of a judgment of the United States Court of

Appeals for the Fourth Circuit dated January 12, 1982, affirming the Petitioner's conviction for violations of 21 U.S.C. §§ 841(a)(1) and 846 (1976). The Petitioner subsequently petitioned the United States Court of Appeals for the Fourth Circuit for rehearing in a timely manner. Rehearing was denied on March 2, 1982. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

Fed. R. Evid. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 801(d)(2)(E):

> (d) A statement is not hearsay if—
>
> . . .
>
> (2) The statement is offered against a party and is . . .
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Crim. P. 30:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court

instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

STATEMENT OF THE CASE

On February 14, 1979, the Petitioner and his co-defendant, Robert Dixon Coffey, were found guilty by a district court

jury of illegally conspiring to distribute and distributing Schedule II controlled substances contrary to 21 U.S.C. §§ 841(a)(1) and 846 (1976).[1] The Petitioner subsequently appealed to the United States Court of Appeals for the Fourth Circuit, which reversed his conviction. United States v. Coward, 630 F.2d 229 (4th Cir. 1980). The court of appeals ordered reversal because it found a fatal variance between the indictment, which charged a three-party conspiracy, and the evidence adduced at trial, which supported a finding of two separate two-party conspiracies. The

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[1] A federal grand jury had earlier charged the Petitioner, Coffey and a physician, Gerald Cobern Shingleton, with conspiracy to distribute Schedule II controlled substances and with numerous counts of distributing Schedule II controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846. At the time of trial, however, Shingleton could not be located. Thus, only the Petitioner and Coffey were tried on the indictment.

court ordered that the Petitioner and Coffey be retried separately.

The Petitioner's case was placed on the district court calendar for retrial on December 8, 1980. No new indictment was sought by the government. Instead, in the attempt to conform to the ruling of the court of appeals, when the trial court read to the jury the charges against the Petitioner, it altered the indictment by omitting all references therein to Coffey and to any alleged substantive violations by Shingleton. Counsel for the Petitioner objected to the changing of the indictment by the trial court, arguing that, in omitting Coffey from the conspiracy charge (originally charging the Petitioner, Coffey and Shingleton with conspiracy), the court has changed the focus of the conspiracy charge and had thus improperly amended the indictment. The court overruled this objection.

At trial, the government obtained the admission into evidence of several hundred prescriptions filled by the Petitioner which were dated after July 20, 1978. The Petitioner contended that the admission of these prescription records was improper because the government was unable to demonstrate their relevance. The Petitioner noted first that the records were admitted without any foundation demonstrating their illegality. Second, the records were not relevant because there had been no overt act pursuant to any conspiracy, nor was any substantive count alleged to have occurred after July 20, 1978. The Petitioner contended that the admission of the voluminous number of prescription records severely prejudiced his case because they invited the jury to infer guilt from the sheer breadth and volume of evidence offered against him.

After both sides had presented their

cases, and the jury charge had been given, the trial judge sent an unredacted copy of the original bill of indictment to the jury for reference during their deliberations. During their deliberations the jury was accordingly apprised, for the first time, of an alleged three-party conspiracy between the Petitioner, Coffey and Shingleton, and of numerous substantive counts of controlled substances violations against Coffey and Shingleton. Counsel for the Petitioner would have objected to the submission of the unredacted indictment to the jury, as he had objected to irregularities regarding the indictment at other stages of the trial. He was given no opportunity, however, to object outside of the presence of the jury.

On December 11, 1980, the jury concluded its deliberations, and found the Petitioner guilty of conspiracy to distribute and distributing Schedule II controlled substances

in violation of 21 U.S.C. §§ 841(a)(1) and 846. A timely appeal was filed with the United States Court of Appeals for the Fourth Circuit by the Petitioner. All of the questions presented to this Honorable Court, inter alia, were raised in this appeal. On January 12, 1982, the court of appeals affirmed the Petitioner's conviction. A motion for rehearing was denied on March 2, 1982.

REASONS FOR GRANTING THE WRIT

Several important questions of federal law are presented by this case.

I

First, the Petitioner requests that the Court rule on a question fundamental to the fairness and the integrity of federal conspiracy prosecutions. According to the ruling appealed from, the government in narcotics conspiracy prosecutions may

admit against the defendant evidence of narcotics transactions which occurred after the charged conspiracy was over. This ruling drastically expands the evidentiary principles which have been heretofore applied to federal conspiracy cases.

This Court has long made it clear that post-conspiracy evidence may not be admitted against the defendant. See, e.g., Fiswick v. United States, 329 U.S. 211 (1946); Krulewitch v. United States, 336 U.S. 440 (1949); Wong Sun v. United States, 371 U.S. 471 (1963); see also Fed. R. Evid. 801(d)(2)(E). The often-stated policy for this rule is that the accused conspirator should not be required to bear the responsibility in a conspiracy prosecution for acts which were not part of the conspiracy. See Fiswick, supra, 329 U.S. at 217; Wong Sun, supra, 371 U.S. at 490. This Court has so ruled in conformance with its general policy against expanding "[t]he already

pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald v. United States, 353 U.S. 391, 404 (1957).

The principles enunciated above, albeit largely in cases discussing the admissibility of statements of co-conspirators, conflict with the ruling of the lower court. The lower court ruling, rather than restricting the scope of conspiracy prosecutions, markedly broadens them by allowing into evidence proof of other alleged criminal acts which are in no way connected to the conspiracy. This is not consistent with previous rulings of this Court that restrict the evidence which may be introduced in conspiracy cases to evidence directly pertaining to the conspiracy. The Court should rule on this question to ensure that the scope of federal conspiracy prosecutions is not greatly broadened because of the vast amount of post-conspiracy evidence which could be admitted in many prosecutions.

The lower court ruling on the admission of evidence relating to the narcotics transactions after the conspiracy is also in conflict with principles enunciated by this Court, and with decisions of the various courts of appeals, relating generally to the admission of evidence of other crimes, wrongs, or acts of the accused. This Court has made it clear that inquiry at trial into crimes unconnected with the one charged is prohibited. Johnson v. United States, 318 U.S. 189 (1943). Inquiry into other crimes and acts of the defendant is only proper when the other crimes or acts directly relate to an element of the offense charged or to other matters which must be demonstrated by the government. Michelson v. United States, 335 U.S. 469 (1948); see also Fed. R. Evid. 404(b).

In applying the rules set out by this Court, the other courts of appeals have scrupulously ensured that no other crimes

or acts of the defendant have been admitted against him unless they have been demonstrated to closely relate to a crucial element of proof. When admission has been allowed, the evidence (usually of prior crimes or acts) has been shown to directly relate to a crucial issue. See, e.g., United States v. Lam Lek Chong, 544 F.2d 58 (2d Cir. 1976), cert. denied sub nom. Liganoza v. United States, 429 U.S. 862 (1977) (evidence related to prior guilty knowledge, especially relevant to entrapment defense); Matthews v. United States, 407 F.2d 1371 (5th Cir. 1969), cert. denied, 398 U.S. 968 (1970) (evidence related to crucial case facts); United States v. Marchildon, 519 F.2d 337 (8th Cir. 1974) (evidence relevant to intent); United States v. Jones, 476 F.2d 533 (D.C. Cir. 1973) (evidence relevant to identity and common scheme or plan); United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978) (evidence discovered

during arrest subsequent to indictment directly related to conspiracy charged). Otherwise, admission has been flatly refused. See, e.g., United States v. Jones, 570 F.2d 765 (8th Cir. 1978) (no evidence of unlawfulness of subsequent acts, thus no foundation for admission); United States v. Silva, 580 F.2d 144 (5th Cir. 1978), aff'd after remand, 611 F.2d 78 (5th Cir. 1980) (evidence admitted on intent—intent not issue at trial); United States v. James, 555 F.2d 992 (D.C. Cir. 1977) (evidence preceded crime charged by sixteen days—held not probative); cf. United States v. Seelig, 622 F.2d 207 (6th Cir.), cert. denied, 449 U.S. 869 (1980) (admission of pharmacy sales records improper in prosecution for illegal distribution of narcotics—jury invited to infer guilt from volume of narcotics sales without showing of illegality).

If the decision of the lower court is allowed to stand, the holdings of these

cases, and of this Court, will be contradicted. In the opinion below, the court of appeals has allowed the admission of evidence of other allegedly illegal acts with no showing of their illegality, and thus no foundation for their relevancy to the Petitioner's case. By the government's own admission, the alleged conspiracy in which the Petitioner participated ended on July 20, 1979, and, in addition, no substantive violation was alleged to have occurred after this date. Nonetheless, the government obtained the admission of hundreds of prescriptions dated after July 20, 1979. When the court below found no error in the admission of the evidence, it drastically enlarged the scope of the rule allowing only limited admission of evidence of other crimes or acts of a criminal defendant. If this ruling is let stand, there would be no limit to the admissibility of evidence of other crimes or acts of a criminal defendant.

II

The remaining questions presented by this case involve the court's treatment of the indictment at the Petitioner's trial. First, the Petitioner contends that this Court should decide the question of whether the trial court's alteration of the indictment was proper. The court below held that the trial judge acted properly when, without resubmitting the indictment to the grand jury, he struck all mention of an alleged conspiracy with a third party, one Robert Dixon Coffey. This ruling, the Petitioner submits, contravenes the decisions of this Court which have steadfastly ensured that "[n]o person shall be held to answer for a capital or otherwise infamous offense, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V.

It was made clear by this Court in Ex parte Bain, 121 U.S. 1 (1886), that

an indictment may not be amended by an order of the court; the indictment must be resubmitted to the grand jury. The vitality of this principle has never been diminished. See Stirone v. United States, 361 U.S. 212 (1960). The only changes which may be made in the indictment without resubmission to the grand jury are those which concern mere matters of form or surplusage. Ford v. United States, 273 U.S. 593 (1927); Russell v. United States, 369 U.S. 749 (1962).

The lower court held that the trial judge's deletion of the conspiracy count involved mere surplusage and was thus not unconstitutional. This decision greatly expands the limited "form" or "surplusage" exception. By unilaterally changing the crime charged from a three-party to a two-party conspiracy, the trial court changed the entire focus of the case. According to the decisions of this Court, the grand

jury should have had the opportunity to decide whether, in what had become a new case, there was sufficient evidence to indict the Petitioner. Compare Salinger v. United States, 272 U.S. 542 (1926) (no impermissible amendment of indictment when part of charge pertaining to scheme to defraud was withdrawn from jury; nature of the case was unchanged, one small portion thereof was merely deleted). The Petitioner submits that this Court should rule on this question in order to prevent trial courts from, in effect, creating entirely new indictments without consulting the grand jury, contrary to the fifth amendment.

The Petitioner also urges this Court to rule on the propriety of amendment of indictments by trial courts in order to clarify a confused body of law which has been developed in the courts of appeals. See United States v. Cirami, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964

(1975). Although the courts of appeals have permitted changes in indictments which are clearly changes in form, see, e.g., United States v. Doby, 598 F.2d 1137 (8th Cir. 1979) (name of robbed bank); United States v. McGrath, 558 F.2d 1102 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (name of employer); United States v. Zambito, 315 F.2d 266 (4th Cir.), cert. denied, 373 U.S. 924 (1963) (date of offense), when the changes relate more closely to the substance of the case, the results of the cases and the principles applied have not been consistent. Compare United States v. Stewart Clinical Laboratory, Inc., 652 F.2d 804 (9th Cir. 1981) (jury instruction interpreting federal medical laboratory fraud statute as proscribing referrals of lab substances taken from persons for remuneration held to impermissibly amend indictment charging illegal referral of persons); and United States v. Crocker,

568 F.2d 1049 (3d Cir. 1977) (introduction of evidence relating to false testimony allegedly given about one person impermissibly amended indictment charging that false testimony had been presented about another person); with United States v. Horton, 562 F.2d 529 (8th Cir. 1977) (per curiam)) (no improper amendment by changing charge of causing unlawful sale of firearms to causing licensed firearms dealer to unlawfully sell firearms); United States v. Cahalane, 560 F.2d 601 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978) (government's listing of additional overt acts and co-conspirators not included in indictment held not an impermissible amendment); United States v. Milestone, 626 F.2d 264 (3d Cir.), cert. denied, 449 U.S. 920 (1980) (indictment charging defendant with receipt of unlawful bribe with intent to affect defendant's decision and decision of Internal Revenue Service agent not

improperly amended by deletion of reference to Internal Revenue Service agent); United States v. Craig, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978) (no impermissible amendment in mail fraud and promotion of unlawful activities case, despite government's striking of counts based upon activities arguably protected by state legislative speech or debate privilege which were part of general scheme charged). This Court should determine in this case a more precise test than that heretofore provided to enable the courts of appeals to reach more consistent and predictable results.

III

The Petitioner requests that this Court decide an important question regarding the propriety of the trial judge's decision to allow the jury to take into their deliberations an unredacted copy of the original

indictment. The Petitioner's case was severely prejudiced by this action since the unredacted indictment contained allegations regarding numerous illegal narcotics transactions involving an alleged co-conspirator of Petitioner's, Robert Dixon Coffey. The original indictment also charged the Petitioner's alleged co-conspirator Shingleton with numerous substantive counts of narcotics violations. The jury was thus invited to presume the Petitioner guilty of narcotics violations because of his association with Coffey and because of the other charges against Shingleton.

This Court has not ruled on the propriety of submitting to the jury an indictment containing numerous uncharged counts. The decisions of the courts of appeals, however, are in conflict with the Fourth Circuit's opinion in the Petitioner's case allowing the jury to have a copy of such an indictment. Although the courts of appeals have ruled

that usually it is proper for the jury to be given a copy of the indictment, if properly instructed, see, e.g., United States v. Wedelstedt, 589 F.2d 339 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); United States v. Tucker, 526 F.2d 279 (5th Cir.), cert. denied, 425 U.S. 958 (1976); United States v. Todaro, 448 F.2d 64 (3d Cir. 1971), cert. denied, 404 U.S. 1040 (1972), the lower courts have made it clear that when the indictment contains other uncharged offenses, these should be redacted before the jury may be given a copy of the indictment. United States v. Skolek, 474 F.2d 582 (10th Cir. 1973) (per curiam); United States v. Maselli, 435 F.2d 1197 (6th Cir. 1976); United States v. Cirami, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); see also United States v. Milestone, 626 F.2d 264 (3d Cir.), cert. denied, 449 U.S. 920 (1980); United States v. McCrane, 527 F.2d 906 (3d Cir.

1975), vacated on other grounds, 427 U.S. 909, aff'd on remand, 547 F.2d 204 (3d Cir. 1976) (per curiam); United States v. Coast of Maine Lobster Co., Inc., 557 F.2d 905 (1st Cir.), cert. denied, 434 U.S. 862 (1977); cf. United States v. Haynes, 573 F.2d 236 (5th Cir.), cert. denied, 439 U.S. 850 (1978) (no error in submitting eighteen count indictment to jury when only seven counts actually involved at trial because, inter alia, defense counsel failed to object and defense counsel himself referred to eighteen count indictment in the presence of the jury). The Petitioner requests that this Court grant review in order to bring the case law on this important point into uniformity, and to redress the prejudices suffered by the Petitioner in this case.

IV

The last issue presented for this Court's review also arose from the trial court's decision at the conclusion of the jury charge to submit the unredacted copy of the indictment to the jury. The trial judge made this decision without having earlier informed counsel for the Petitioner out of the presence of the jury. Counsel for the Petitioner was thus given no opportunity to object to the decision to give the jury a copy of the unredacted indictment out of the jury's presence. Counsel clearly would have exercised this opportunity as he had done so previously when other irregularities involving the indictment had occurred.

According to Fed. R. Crim. P. 30, sufficient opportunity must be given to counsel to make objections out of the presence of the jury. This Court has ruled in Hamling v. United States, 418 U.S. 87

(1974), that a violation of this rule may constitute reversible error. In Hamling, this Court left open the question of whether the defendant must show prejudice in order for reversal to be ordered. The Petitioner submits that this Court should grant review to decide this important issue of federal criminal procedure. The Petitioner clearly suffered prejudice in being denied the opportunity to object out of the jury's presence,[2] since the lack of an objection resulted in the jurors being given the copy of the unredacted indictment.[3] This case thus presents the Court with an excellent opportunity to refine the standard

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[2] As the Petitioner has previously specified, the prejudicial effect of the judge's decision to submit an unredacted copy of the indictment to the jury is that the jury was invited to find the Petitioner guilty because of his association with his co-conspirators.

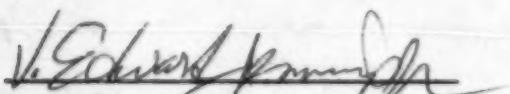
[3] The Petitioner had no meaningful opportunity to object in the presence of the jury. Such an objection would have necessarily apprised the jury of the other counts in the indictment, which was the very result the Petitioner wanted to avoid.

of review to be applied to cases involving the lack of the opportunity to object. Since prejudice is clear in the Petitioner's case, this Court may now squarely rule on whether such a showing is required in order for reversal to be obtained.

CONCLUSION

Based on the foregoing, the Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of March 1982 mailed three copies of this petition, first class postage prepaid, to each of the following parties:

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Appendix

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILLY THOMAS COWARD, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,

v.

BILLY THOMAS COWARD, Appellant.

UNITED STATES OF AMERICA, Appellee,

v.

ROBERT DIXON COFFEY, Appellant.

Nos. 79-5099, 79-5100

SPROUSE, Circuit Judge:

A district court jury found the defendants Coffey and Coward guilty of both illegally conspiring to distribute and distributing Schedule II controlled substances. An extensive 1978 investigation of illegal Schedule II drug sales in the Landis, North Carolina area had implicated both pharmacists. Agents of the North Carolina Board of Pharmacy testified that the defendants routinely filled prescriptions ostensibly written by a local physician, Gerald C. Shingleton. The doctor, indicted as a co-conspirator

but not tried due to his absence from the state, supplied signed blank prescription pads to the defendants. The patient's name and medication were routinely added after a telephone order from Shingleton's receptionists. Those same receptionists supplied prescription refills in the doctor's absence for a $3.00 fee, gave verbal approval for the pharmacists to make refills, and frequently referred patients to the defendants' stores.

Defendant Coffey not only collected $3.00 prescription fees for Shingleton for called-in refills but also actively promoted such refill procedures, permitting the receptionists to complete the blank forms in his presence. Defendant Coward authorized refills by telephone and referred an undercover agent to another area physician who would readily prescribe large quantities of Schedule II drugs without questions. After Dr. Shingleton left town in August,

1978, Coward paid a receptionist to keep his office open and to send any refills to Coward.

The grand jury indictment charged a conspiracy between Shingleton, Coffey, and Coward. In addition to the single three-party conspiracy count, the indictment charged twenty-five substantive violations of the Controlled Substances Act (21 U.S.C. § 841(a)(1)) by Dr. Shingleton, five violations by Coffey, and seventeen violations by Coward.

The evidence at trial showed unrelated conspiracies between Coffey and Shingleton, and between Coward and Shingleton. The government produced abundant evidence from which a jury could infer the separate conspiracies. At the end of the government's case, however, the district court found that no evidence supported the conspiracy count charging Coward, Coffey, and Shingleton with a single conspiracy. The defendants

contend this shows a fatal variance between the indictment and proof at trial. We agree and reverse the lower court's judgment both as to the conspiracy and the drug distribution convictions.

Throughout the trial the district court carefully cautioned the jury as to which items of evidence related to each defendant. The trial, nonetheless, was often confusing for both the attorneys and the jury. The two defendants had similar names. Many witnesses presented details of 51 separate conspiratorial overt acts. Detailed testimony revealed undercover agents' separate contacts with each individual defendant and with Dr. Shingleton, the common perpetrator, with each of them but not jointly with both.

The most significant incident illustrating the confusion occurred during the government's closing argument to the jury. The Assistant United States Attorney commented

on an undercover agent's conversation with Coward. Coward had identified another physician who would readily write prescriptions in quantity for Schedule II controlled substances. The government attorney mistakenly named Coffey as the person making the statement to the undercover agent. The attorney later apologized and explained his mistake to the jury. The jury, however, after a day-and-a-half of deliberation, expressed their confusion. They requested the court to inform them as to which one of the defendants had taken part in the incriminating conversation. Coward understandably objected to any clarification while Coffey urged the court to provide the information. The jury's request was refused.

The Supreme Court drew the parameter of error for such variances in conspiracy cases in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935),

and Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Berger opinion held that a variance between the indictment and proof of multiple conspiracies rather than a single conspiracy would not result in reversible error unless it resulted in prejudice to the defendant. The Court said:

> It is settled by the great weight of authority that, although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material.

Id. 295 U.S. at 81, 55 S.Ct. at 630, and

> . . . a variance such as that here dealt with . . . was not prejudicial and hence not fatal.

Id. at 83-84, 55 S.Ct. at 631.

In Kotteakos the Supreme Court held that the allegation of a single conspiracy, but proof of separate conspiracies under the circumstances of that case could, without

more, demonstrate prejudice. The defendants in Kotteakos were numerous and the conspiracies complex. This Court in United States v. Goss, 329 F.2d 180 (4th Cir. 1946), in reaching a similar result, stressed the large number of co-conspirator defendants. In the instant case, there were only two defendants and the issues were not as complex as either Kotteakos or Goss. The trial court, moreover, correctly instructed the jury. It is not necessary, however, to determine if the complexity of the trial approached the dimensions of that in the Kotteakos or Goss trial. The jury's deliberations and their failure to understand the connection of incriminating evidence to a particular defendant demonstrated their confusion. This exhibited actual prejudice judged by the Berger criterion.

The trial court was eminently fair in the conduct of the trial and did everything possible to assure that the jury

only considered the appropriate evidence against each defendant. This proved to be an impossible chore, however, due both to the subtleties of the evidence and to its emanation from common sources. It is highly probable that the jury's confusion also affected its verdict on the substantive drug distribution charges. As stressed in Goss, the misjoinder of the defendants accentuated the prejudicial effect of the variance. Although the defendant did not move for a Rule 14 severance at the end of the government's case, it is now clear that the defendants should have been tried separately.

The judgment, both as to the conspiracy and drug distribution convictions, is therefore reversed and remanded and, upon remand, the defendants should be granted separate trials.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5029

UNITED STATES OF AMERICA, Appellee,

v.

BILLY THOMAS COWARD, Appellant.

BRYAN, Senior Circuit Judge:

Appellant Billy Thomas Coward seeks reversal of his convictions for multiple violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 et seq. Finding his assignments of error meritless, we affirm.

I

The facts depict a physician and a pharmacist misusing their professions to facilitate the wide-ranging abuse of

controlled drugs in and about Landis, North Carolina. The physician, Dr. Gerald C. Shingleton, favored his patients with a steady and ready supply of prescriptions for stimulants and depressants. He wrote prescriptions without pretext of a professional assessment of the recipient's medical requirements. Indeed, if requested, Dr. Shingleton prescribed stimulants and depressants simultaneously.

As a physician, Dr. Shingleton could authorize controlled drugs for his patients but could not actually provide them. Provision of the drugs required the services of a pharmacist who would not be alarmed at the prospect of serving customers large quantities of either stimulants or depressants or both. The doctor found two such pharmacists: appellant Coward, the proprietor of Landis Drug Company in Landis, and one Robert Dixon Coffey, who did business in a neighboring town.

In time Dr. Shingleton established a mutually profitable relationship with each pharmacist; he prescribed, the pharmacists vended. The Shingleton-Coward venture included such features as Dr. Shingleton's giving discount coupons for Landis Drug and establishing direct telephone lines between the doctor's office and Coward's pharmacy. Shingleton also furnished Coward with presigned blank prescription pads to facilitate prescription-by-telephone service.

So noticeable a trade in controlled drugs emanating from Landis drew the attention of the State and Federal authorities. Agents went into the field to obtain controlled drugs from Dr. Shingleton without demonstrating a medically acceptable need for these drugs; they succeeded. The investigation further revealed the complicity of the pharmacists. Sensing the imminent demise of his enterprise, Dr. Shingleton

hastily departed from Landis. Undaunted by Shingleton's disappearance, Coward engaged a receptionist to open the doctor's office and refer requests for prescription refills to Coward's. Shortly thereafter, the authorities closed in.

On December 4, 1978, a Federal grand jury returned a multiple-count indictment against Shingleton, Coward and Coffey. Count one charged the three men with a single conspiracy to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1)[1] and 21 U.S.C. § 846.[2] The

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[1] 21 U.S.C. § 841(a)(1):

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

[2] 21 U.S.C. § 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or

remaining counts charged separate violations of § 841(a)(1) to each defendant.

A joint trial of Coward and Coffey began February 13, 1979. At the close of the Government's case, the District Court ruled the evidence insufficient to underprop the charge of a single conspiracy among Coward, Coffey and Shingleton. The jury, however, was permitted to consider whether either Coward or Coffey was guilty of a separate two-person plot with Shingleton. Verdicts against both men were found.

Coward and Coffey appealed their convictions, arguing that they were prejudiced by the District Court permitting the jury to consider the possibility of two distinct conspiracies rather than a single three-

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[2] (continued)

fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

person complot among Coward, Coffey and Shingleton. Finding prejudice evinced in the jury's confusion over which acts of conspiracy were ascribable to each defendant, this Court reversed and recommitted the case for separate trials of Coward and Coffey. United States v. Coward, 630 F.2d 229 (4th Cir. 1980). The decision stressed, however, that abundant testimony existed to uphold the jury's determination that each pharmacist participated in a separate conspiracy with Shingleton; the confusion generated by the trial was the sole basis for reversal.

Retrial of Coward ensued December 8, 1980. Indictment count one was tried only in respect to Coward and Shingleton; as the District Court read this charge to the jury, all references to Coffey were omitted. The individual counts laid to Shingleton and Coffey similarly were deleted. When the jury retired to deliberate,

the complete indictment, with all references to Coffey intact, was sent to the jury room pursuant to local court rule. The jury declared Coward guilty on all counts, save two of the substantive counts, and judgment was passed accordingly; this appeal followed.

II

Coward urges that his retrial on the conspiracy count twice placed him in jeopardy for the same offense. Ordinarily, retrial of a defendant following appellate reversal of an earlier conviction does not raise the double jeopardy bar. United States v. Ball, 163 U.S. 662 (1896). An exception to this general rule is invoked if the reversal is ordered solely because the Government's proof fails to justify the conviction. In that situation, the reversal is equivalent to declaring the District Court in error for not directing

an acquittal, and the double jeopardy rule bars a retrial. Burks v. United States, 437 U.S. 1 (1978).

Coward presses that this exception obtains here because the three-person conspiracy was held unproven. This insistence, however, springs from a misunderstanding of the basis for vitiating his first conviction. The Government's inability to establish a unitary three-person conspiracy did not require reversal and new trial. When the indictment avers a unitary conspiracy but the proof instead reveals a set of separate conspiracies, the variance is not necessarily fatal to the Government's case. Berger v. United States, 295 U.S. 78, 81-84 (1935). Reversal is appropriate only if the discord "'affect[s] the substantial rights' of the accused." Id. at 82. Such a material variance was seen in Kotteakos v. United States, 328 U.S. 750 (1946). There the defendants were

indicted for a single conspiracy; the proof, however, described eight distinct conspiracies. The Court believed the jury's confusion resulting from the necessity of sorting the evidence according to defendant and conspiracy was too great to let the conviction stand. Id. at 769-71.

This Court's earlier reversal of Coward's conviction was based on a straightforward application of Kotteakos. The error was not in the proof: "[t]he government produced abundant evidence from which a jury could infer the separate conspiracies" with Shingleton. 630 F.2d at 230. As in Kotteakos, the source of error was jury confusion stemming from the necessity to consider two conspiracies instead of just one. As exampling this confusion, the Court cited the similarity between Coward and Coffey's names and their erroneous transposition during the prosecutor's

closing remarks.[3] Consequently, the trial court's error was not its failure to direct an acquittal, but rather its failure to order separate trials for the two defendants. For this reason, the exception to the rule allowing retrial espoused in Burks does not pertain here.

III

Coward next contends that the District Court impermissibly amended the indictment by omitting references to Coffey when reading it to the jury at the outset of the trial. Coward cites the general rule forbidding amendment of an indictment by the court or prosecutor. Ex parte Bain, 121 U.S. 1 (1887). See generally 1 Wright & Elliott, Federal Practice &

[3] See id. at 231. The finding of jury confusion was not mere speculation by the Court. The jury, following more than a day of deliberation, requested that the District Judge clarify the evidence, but this request was refused.

Procedure: Criminal § 127. But the Government maintains that this matter falls within the generally acknowledged exception which permits the court to strike surplusage from the indictment. See, e.g., United States v. Burnett, 582 F.2d 436 (8th Cir. 1976); United States v. Holt, 529 F.2d 981 (4th Cir. 1976).

The allowance of surplusage deletion manifests the rejection of an inflexible reading of the practice in Bain in favor of a reading sensitive to purposes served by the indictment. The Third Circuit forcefully fixed the contours of the rule as follows:

> Properly viewed, Bain and its progeny forbid two general kinds of amendments to indictments. First, Bain prohibits any amendment that transforms an indictment from one that does not state an offense into one that does. . . . The second improper alteration is seen

> in any change that tends to increase the defendant's burden at trial. . . . [This second type of amendment] is proscribed because it has the effect of undermining the notice function of the indictment.

United States v. Milestone, 626 F.2d 264, 269 (3d Cir.), cert. denied, 449 U.S. 920 (1980).

Applying these tests to the instant case, we are convinced that the District Court excised nothing but surplusage from the indictment. We have shown that Coward could have been found guilty of a two-person conspiracy with Shingleton despite the indictment's charge of a three-person conspiracy including Coffey; jury confusion, not the form of the indictment, required a new trial. Hence, there was no "amendment that transforms an indictment that does not state an offense into one that does." Likewise, Coward can point to no prejudice to him resulting from the obliterations;

the Government's case and Coward's defense remained unchanged. Thus, the District Court made "no change that tends to increase the defendant's burden at trial."

IV

The third issue framed by Coward is whether the District Court erred by sending an unedited copy of the indictment to the jury room as required by local court rule.[4] Coward's counsel made no objection to this practice at trial, despite his presumed knowledge of the local rule. When the District Judge initially read the indictment to the jury, he explicitly informed them that he omitted portions "which did not relate to the defendant

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[4] Faced with this situation, other courts have followed the practice of submitting an edited version of the indictment to the jury. See United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), cert. denied, 426 U.S. 906 (1976); United States v. Bryant, 471 F.2d 1040 (D.C. Cir. 1972), cert. denied, 409 U.S. 1112 (1973).

before this Court . . . ." Furthermore, the jurors were instructed repeatedly that an indictment is only a formal charge and does not constitute evidence. These admonitions effectively offset any hypothetical prejudice resulting from the jury's receipt of the unedited indictment.

V

Coward makes several assignments of error relating to the admission into evidence of over 800 prescriptions for controlled drugs written by Shingleton and filled by Coward during the time of the alleged conspiracy. These exhibits were erroneously suppressed by the District Court prior to the initial trial of Coward and Coffey; a factual misunderstanding as to the ownership of these records induced the District Court's mistake. Although it had not appealed the earlier ruling, the Government clarified the error at

the retrial and successfully moved for the admission of this evidence.

Coward now contends that principles of due process allowed him to rely on the District Court's earlier ruling. We know of no such due process right. Remand of the case for a new trial effectively cleansed the slate; the District Court properly corrected as many errors of the first trial as was possible.

Coward also mounts an attack on the relevance of this evidence. It is sufficient to note that the use of such material to prove a defendant's knowledge and intent in a prosecution of this nature has been sanctioned repeatedly by the Courts of Appeals. See, e.g., United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978); United States v. Ellzey, 527 F.2d 1306, 1307 (6th Cir. 1976).

Coward's contention that the prejudicial value of this evidence outweighs its probative

value likewise lacks merit. This determination is committed to the discretion of the trying court and will not be overturned absent "grave abuse." United States v. Tibbetts, 565 F.2d 867 (4th Cir. 1977). No such abuse is apparent here.

VI

Coward's final contention is that the prosecutor committed reversible error during his closing remarks by referring to him as a "pusher" and unwarrantedly associating him with common street peddlers of illegal drugs. We do not understand the term "pusher" to be so specific. Evidence adduced at trial amply convicted Coward and supported the inference of the prosecutor's remark. See United States v. Welebir, 498 F.2d 346 (4th Cir. 1974).

As all of Coward's arguments have proved wanting in weight of persuasion, the judgment appealed is

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5029

UNITED STATES OF AMERICA, Appellee,

v.

BILLY THOMAS COWARD, Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing, en banc, it is

ADJUDGED and ORDERED that the petition for rehearing is denied.

On motion of appellant, it is further ADJUDGED and ORDERED that the mandate of this Court be stayed for thirty (30) days to permit appellant's application for a

writ of certiorari from the United States Supreme Court.

Entered at the direction of Judge Bryan with the concurrence of Judge Ervin and Judge Chapman.

For the Court,

/s/ William K. Slate, II

CLERK